No. 99-200

In The

Supreme Court of the United States

ANN McCLURE, Document Custodian; Gary Rose, Commissioner of Department of State Police; JUSTICE CABINET; DEPARTMENT OF STATE POLICE; BEN CHANDLER, Attorney General for the Commonwealth of Kentucky,

Petitioners,

v.

STEPHEN AMELKIN, Broadway Chiropractic; DR. BRIAN CHRISTOPHER FEE; STUART LYON; NICHOLAS BAKER; DAVID KAPLAN; JAMES W. CHAMBERS; SIDNEY HANISH; RHODA DANIELS; THOMAS H. WATSON; KENNETH W. WALL; JAMES BOGARD, doing business as Bogard & Associates,

AND

CITY OF LOUISVILLE, Division of Police; Jefferson County Kentucky; and Class of all police agencies in the Commonwealth of Kentucky; and LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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RESPONSE TO PETITIONERS' STATEMENT OF QUESTIONS PRESENTED

The Petitioners, the Justice Cabinet and the Attorney General for the Commonwealth of Kentucky, have presented three questions in their Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. The Respondents, Stephen Amelkin, Brian Christopher Fee, Stuart Lyon, Nicolas Baker, David Kaplan, James W. Chambers, Sidney Hanish, Rhoda Daniels, Kenneth W. Wall, and James Bogard, believe that the first and second questions identified by Petitioners are actually the same issue but that the third question is not ripe for review by this Court. This latter issue concerns Respondents' claim that Petitioners imposed discriminatorily excessive fees in order to prevent Respondents from obtaining copies of motor vehicle accidents so that they could not use the reports to solicit patients or clients. While Respondents prevailed on this claim at the District Court, the Sixth Circuit reversed the District Court's ruling and remanded it to the District Court for specific findings to support the injunctive relief granted. *Amelkin v. McClure*, 168 F.3d 893, 902 (6th Cir. 1999). Accordingly, there is no ruling by the Sixth Circuit on this issue reviewable by this Court.

Additionally, Petitioners' "explanation" of their "questions presented" is an incoherent mish mash of topics which, among other faults, raises an issue not present in this case. Petitioners state that the questions presented "involve irreconcilable conflicts in lower federal and state appellate decisions . . . touching on lower federal appellate decisions concerning the Federal Driver's Protection Act and the Tenth Amendment to the United States Constitution." Petition for Certiorari at

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pages i-ii (hereafter "Petition at ___"). Petitioners go on to note that this Court "has already granted certiorari in two cases that are similar but not directly on point with the questions presented herein due to the conflicting decisions throughout the United States," *citing Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998), *cert. granted*, 119 S.Ct. 1753, 143 L.Ed.2d 786, 67 U.S.L.W. 3588 (May 17, 1999). *Condon* involved the constitutionality under the Tenth Amendment of the Driver's Privacy Protection Act, 18 U.S.C. § 2721 *et seq*. While this Act has been cited by the Petitioners as supportive of the Kentucky General Assembly's reasons for enacting the statute found to be unconstitutional by the Sixth Circuit, its constitutionality under the Tenth Amendment was not challenged by any of the parties in this action and was not addressed by the Sixth Circuit. Nor is the unconstitutionality of the Act pertinent in any way to the Sixth Circuit's determination that the Kentucky statute challenged in this action unconstitutionally infringed upon the First Amendment rights of the Respondents.

RESPONSE TO PETITIONERS' LIST OF PARTIES IN THIS PROCEEDING

Respondents take exception to the five pages of the Petition devoted to its list of "all parties in this proceeding from consolidation of the following cases before the United States District Court." Petitioners have improperly provided to this Court the styles of six different cases, implicitly representing that the parties in each of these cases are parties to this proceeding. In fact, the only persons who are parties to this proceeding are the persons listed in case number 1, identified at page iii of the Petition, and the case identified at page v of the Petition, identifying the parties in two open records cases that had originally been filed with the Kentucky Attorney General, appealed to a Kentucky state court, removed to the United States District Court for the Eastern District of Kentucky, and transferred by that Court to the United States District Court for the Western District of Kentucky, where they were consolidated with this case.

The case identified at page iv of Petitioner's brief (*Northern Kentucky Chiropractic v. Steve Ramey, et al.*) is a separate case from this and was never consolidated with this case. Similarly, the case identified at page vi of the Petition (*Stephen Amelkin, D.C., et al. v. Jefferson County, Kentucky*, Civil Docket No. 95-CV-22), was consolidated with this case but the Defendants in that action did not appeal the Court's ruling to the Sixth Circuit. Accordingly, the ruling in that case is final and the parties thereto are not before this Court.

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RESPONDENTS' STATEMENT OF THE CASE

Respondents are attorneys, chiropractors, and a publisher of a newsletter who originally brought this action to enjoin the enforcement of amendments passed by the Kentucky General Assembly in 1994. The amendments prohibited the disclosure of motor vehicle accident reports to anyone other than parties to the accident, the insurer of any party who was the subject of the report, and the attorneys of the parties. "News-gathering" organizations were allowed access to the reports, but were explicitly prohibited from using them for "a commercial purpose other than the news-gathering organization's publication or broadcasting of the information in the report." KRS 189.635 Sections (5) and (6). Specifically, KRS 189.635(6) provided that accident reports

> shall be made available to a news-gathering organization, solely for the purpose of publishing or broadcasting the news. The news-gathering organization shall not use or distribute the report, or knowingly allow its use or distribution, for a commercial purpose other than the news-gathering organization's publication or broadcasting of the information in the report. A newspaper, periodical, or radio or television station shall not be held to have used or knowingly allowed the use of the report for a commercial purpose merely because of its publication or broadcast.

This section of the statute modified section 5, which imposed the limitations noted above.

> All other accident reports required by this section [i.e, accident reports filed by law enforcement officers or agencies], and the information

> contained in the reports shall be confidential and exempt from public disclosure except when produced pursuant to a properly executed subpoena or court order, or except pursuant to subsection (6) of this section. These reports shall be available only to the parties to the accident, the parents or guardians of a minor who is a party to the accident, and the insurers of any party who is the subject of the report, or to the attorneys of the parties.

KRS 189.635(5).

Respondents alleged that the amendments were enacted with the intent of preventing them, and others in their position, from using information from motor vehicle accident reports to solicit persons involved in those accidents as potential patients and clients. Evidence submitted by Petitioners at the hearing on Respondents' motion for a permanent injunction substantiated this claim. The Petitioners argued that they had the right to deny access to the motor vehicle accident reports in order to advance the privacy interests of those involved in vehicular accidents. They supported their argument with evidence purporting to demonstrate that solicitation of patients and clients was distasteful. For example, Petitioners submitted the affidavit of the Executive Director of the Kentucky Bar Association in which he stated that he was "aware of numerous citizen complaints and inquiries . . . regarding targeted solicitation of clients by attorneys through the use of mail." Petitioners also submitted as an exhibit a copy of a statute, enacted by the Kentucky General Assembly in 1996, which prohibits attorneys from soliciting clients within 30 days of the occurrence of an event

for which the individual might require legal representation. Additionally, Petitioners submitted a raft of affidavits and letters from individuals who had been involved in motor vehicle accidents, complaining about receiving solicitation letters from attorneys and chiropractors seeking their business.

Finally, Petitioners' *own attorney*, Lucy B. Richardson, who also represents Petitioners in this proceeding, pursued her personal crusade with her affidavit in which she stated her "personal belie[f] that it is a direct infringement upon her family's right of privacy to allow persons to obtain accident reports which reveal personal information, and that to do so violates her constitutional right of privacy and the safety and sanctity of their home. Further, Affiant believes that publicly revealing her home address is unconscionable, unacceptable, and a personal affront to her rights."

Accordingly, Petitioners supported the constitutionality of the challenged statute by arguing that protecting the privacy rights of citizens of the Commonwealth of Kentucky from solicitation by attorneys and chiropractors such as Respondents constituted a reasonable basis for preventing their access to state motor vehicle accident reports. Unfortunately for Petitioners, however, the challenged statute went further than simply allowing access only to the parties to an accident, their insurers, or their attorneys. In addition, the legislation allowed access to the press for purposes of publishing information contained in the reports, but prohibited any "commercial" use of the reports.

Prior to enactment of these amendments, all accident reports filed by law enforcement officers and agencies were not considered confidential and were open records obtainable by any individual under Kentucky's open records law. Kentucky Attorney General Opinion 89-76; Appendix at App. 2.

After reviewing the arguments of Petitioners and Petitioners' evidence which demonstrated that the intent of the statute was to prevent commercial speech, the District Court found the amendments unconstitutional.

> [I]t is obvious that the State of Kentucky is trying to prohibit attorneys and chiropractors from access to a record which has been compiled by the public and which is available to media and insurance companies representing the parties, and which had been previously available to the public. We believe that the fact that this information is available to the media and insurers is sufficient to warrant the holding that the privacy interest which the state asserts in defense of the statute is not protected by the restriction of the public records to newspapers and insurers.

Memorandum Opinion of District Court; Appendix to Petition at 31-32.

The Sixth Circuit agreed. Rejecting the Petitioners' argument that KRS 189.635 was not unconstitutional because it was a "pure denial of access statute," the Sixth Circuit found that the statute "is not as benign as the defendants would have us believe." *Amelkin*, 168 F.3d at 897. The Sixth Circuit determined that the Section 6 restriction on a " 'news-gathering organization' from using or distributing any accident report that it obtains

for a commercial purpose, other than to publish or broadcast the information in a news report" was a "content-based restriction with respect to news organizations which makes § 189.635 fatally flawed." *Id.* at 897.

Applying this Court's test for analyzing the constitutionality of government regulations limiting commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), the Sixth Circuit found that the Petitioners' asserted interest in protecting "accident victims' privacy and safety by keeping the personal information contained in such reports out of the hands of the general public," was "substantial, as evidenced by the fact that a number of other courts that have considered similar statutes have reached the same conclusion." *Id.* at 898. However, the Sixth Circuit found that the amended statute did not directly and materially advance that interest in protecting the privacy and safety of accident victims. First, the Sixth Circuit noted that the Petitioners "provided no evidence, aside from general averments contained in affidavits, that would support the contention that criminals would use accident reports to harass or further harm accident victims if they had access to the information contained in such reports. The personal information contained in accident reports was in fact available to the general public prior to the amendment of § 189.635, without any evidence of adverse consequences. . . . This asserted harm, therefore, appears to be nothing more than the type of speculation and conjecture that is insufficient to sustain a restriction on commercial speech." *Id.* at 899, *citing Rubin v. Coors Brewing*, 514 U.S. 476, 487 (1995).

The Sixth Circuit found the Petitioners' second argument in support of this statute ("to prevent the direct and unnecessary intrusion into the private lives of accident victims") to be "at least directly and materially linked to the restriction on access to accident reports. The problem, however, is that the statutory exceptions serve to neutralize the government's attempts to protect the privacy of accident victims. . . . The fact that newspapers may inspect and report on the information contained in accident reports belies the defendants' claim that the statute is actually intended to protect the privacy interests of accident victims." *Amelkin*, 168 F.3d at 899. The Sixth Circuit concluded that "the exception to § 189.635(5) for news-gathering organizations precludes the statute from directly and materially advancing the government's purported privacy interest." *Id., citing Valley Broadcasting Co. v. United States*, 107 F.3d 1328, 1334 (9th Cir. 1997). "There is no rational basis for a statute which purports to advance the governmental interest in protecting the privacy of accident victims to allow their names and addresses to be published or broadcast to the general public. . . . The exceptions to § 189.635 'undermine and counteract' the asserted governmental interest in preserving privacy just as surely as did the exceptions in *Coors Brewing*. We therefore conclude that § 189.635(6) fails to satisfy the third prong of *Central Hudson*." *Amelkin*, 168 F.3d at 900.

The Sixth Circuit also addressed Petitioners' claim "that the statutes still advance the interest of protecting the privacy of accident victims because state agencies are required to redact certain personal and private information from any accident report that is provided." *Id.* at 901.

The Sixth Circuit noted that "nothing in this statute . . . requires that state agencies redact such information from accident reports" and that there was nothing in the statutory language of Kentucky's open records law "compelling the custodian of accident reports to redact such personal information before providing the report to news-gathering organizations. That a custodian may choose to do so is obviously not sufficient to cure a constitutional infirmity." *Id.* at 901.

As noted above, Respondents had also lodged an "as applied" challenge to KRS 61.874, which permits state agencies in responding to an open records request to "prescribe a reasonable fee for making copies of non-exempt public records requested for use for non-commercial purposes which shall not exceed the actual cost of reproduction . . . not including the cost of staff required" but may "establish a reasonable fee" for disclosure of public records for commercial purposes which "may be based on one or both of . . . [the] cost to the public agency of media, mechanical processing and staff required to produce a copy of the public record or records; [and the] cost to the public agency of the creation, purchase, or other acquisition of the public records." KRS 61.874(4)(c).

This challenge arose shortly after the District Court first entered an injunction against the enforcement of KRS 189.635. Prior to that time, Petitioners had made copies of motor vehicle accident reports freely available to Respondents with a minimum of bureaucratic hassle at the state police posts where the traffic accident reports were originally filed. The state charged 10¢ per page for the reports, most of which contained one or two pages and almost none of which contained more than four pages. Within

days of the injunction being entered, Petitioners increased the cost of the reports from 10¢ per page to $40.00 per report for non-injury accidents; $90.00 per report for injury accidents; and $230.00 per report for fatal accident reports. With this cost change, Petitioners proposed to charge Respondent Lyon $17,650.00 for copies of two weeks of reports, which previously would have cost him about $68.00. *Amelkin*, 168 F.3d at 902.

Respondents had moved the District Court for summary judgment on this claim. Petitioners did not respond to the motion, nor did they present any evidence at the hearing on Respondents' motion for preliminary and permanent injunctions. The District Court did not specifically address the argument, but in its judgment it enjoined the Petitioners from enforcing the 1994 amendments to KRS 61.874 on which the Petitioners had relied in imposing the exorbitant costs. Appendix to Petition at 33. The Sixth Circuit held that "without the benefit of . . . factual findings" on this issue, "it is impossible for us to judge the validity of the Plaintiffs' arguments. . . . Accordingly, we vacate and remand the case back to the district court to make findings of fact and conclusions of law with regard to how § 61.874 has been applied by the state agency." *Id.* The Sixth Circuit suggested that on remand the District Court

> particularly focus on the 'creation' language in § 61.874(4)(c)(2). The agency could potentially be using this language to charge commercial users not only for the compilation, storage, and upkeep of such records by the agency itself, but also for the state's investigative and personnel costs that went into 'creating' the record. In other words, the agency might be utilizing the

> 'creation' language as a basis to charge more than the agency's marginal or even average cost in producing the records. Instead, the agency might be using this language to recoup the state's costs for law enforcement's investigation that backs up to the creation of accident reports. Any such interpretation of the statute might well be an arbitrary and capricious application sufficient to demonstrate that it is unconstitutional as applied.

Id.

ARGUMENT

I. Petitioners have not stated any compelling reason for this Court to review the decision below inasmuch as the decision does not conflict with the decision of another United States Court of Appeals regarding access to public records.

Petitioners attempt to fit within Supreme Court Rule 10 by identifying as a compelling reason for the Court to exercise its judicial discretion in granting a petition for a writ of certiorari that "the Sixth Circuit Court of Appeals' decision conflicts with its own decisions as well as the decisions of this United States Supreme Court." Petition at 14. Petitioners cite in support of this argument the cases of *Heights Community Congress v. Veterans Administration*, 732 F.2d 526 (6th Cir. 1984), *cert. denied*, 469 U.S. 1034 (1984), and *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), for the principle that "there is no constitutional right by the press or public to access government records." Petition at 14-15.

The issue of whether there is a blanket right of access to public records does not constitute a compelling reason for this Court to grant the Petition, however, because it was not an issue in this case and the Sixth Circuit did not issue a decision inconsistent with this principle. Indeed, the Sixth Circuit acknowledged the *Heights Community* and *Houchins* principle that local government *can* prevent public access to its records in order to protect the privacy of its citizenry. The Sixth Circuit recognized, however, that the issue presented in this case went further than a mere denial of access to public records, pointing out that the statute in issue "is not as benign as the defendants would have us believe." *Amelkin*, 168 F.3d at 897.

The Sixth Circuit did not strike down KRS 189.635 because the statute denied Respondents access to public records. The Sixth Circuit struck down the statute because it denies access to persons in the position of Respondents in order to prevent commercial speech. After all, the statute expressly prohibits the press from using the reports for a "commercial purpose." The Court found that this circumstance materially differentiates the statute from the "pure access" cases relied upon by the Petitioners.

Further underlying the Sixth Circuit's rejection of Petitioners' argument that KRS 189.635 does no more than regulate access to government records to protect the privacy interests of persons offended by the disclosure of information contained in those records was the statute's internal inconsistency in allowing access to the press "for the purpose of publishing or broadcasting the news." KRS 189.635(6). Accordingly, while the Sixth Circuit acknowledged that "the government's asserted interest in

protecting the privacy and safety of accident victims is substantial and, hence, meets the second prong of the *Central Hudson* four-part test to analyze the constitutionality of government regulations limiting commercial speech," the statute failed to advance "the government's interest 'in a direct and material way.' " *Amelkin*, 168 F.3d at 899, *quoting Rubin v. Coors Brewing*, 514 U.S. 476, 487 (1995).

As the Sixth Circuit noted, it is here that the Petitioners' simplistic analysis falls apart. If the interest sought to be protected is the interest of an individual in not having private information contained in motor vehicle accident reports disclosed to anyone other than his insurer or attorney, then why would the statute allow the information to be disclosed to the press, which has no need directly pertinent to that individual to know such information and whose only reason for obtaining it is to further disclose it to the world at large. "The exception to § 189.635(5) for news-gathering organizations precludes the statute from directly and materially advancing the government's purported privacy interest. . . . There is no rational basis for a statute which purports to advance the governmental interest in protecting the privacy of accident victims to allow their names and addresses to be published or broadcast to the general public." *Amelkin*, 168 F.3d at 900. Accordingly, "the exceptions to § 189.635(6) 'undermine and counteract' the asserted governmental interest in preserving privacy just as surely as did the exceptions in *Coors Brewing*." *Id.*

Similarly, the Sixth Circuit rejected the argument made here that, because the statute on its face does not place restrictions on how information obtained from the

government can be used, but merely prohibits the access to the information in the first place, it did not impact on the First Amendment rights of the Respondents. Petition at 22. After all, "subsection 6 of § 189.635 clearly restricts 'news-gathering organizations' from using or distributing any accident report that it obtains for a commercial purpose, other than to publish or broadcast the information in a news report. It is this content-based restriction with respect to news organizations which makes § 189.635 fatally flawed." *Id.* at 897.

Accordingly, Petitioners' argument that the Sixth Circuit's decision conflicts with decisions of this Court and other courts on access to government records is incorrect. The Sixth Circuit clearly distinguished the issues presented in this case from pure public access cases and no such inconsistency can be relied upon as a compelling reason for this Court to grant the Petition.

II. The Sixth Circuit's decision does not conflict with decisions of the Kentucky Supreme Court or its open records laws.

In reaching for a cert-worthy issue, Petitioners further argue that the decision below "has caused a conflict between its decision and Kentucky's Appellate Courts interpreting Kentucky's open records laws regarding privacy." Petition at 22. There is, however, no Kentucky Supreme Court case cited by Petitioners as being in conflict with the Sixth Circuit's decision. The only proceedings relied upon are a case decided by the Kentucky Court of Appeals, which is not a state court of last resort, and opinions of the Kentucky Attorney General, which

have even less authority. See Petition at page 13. Moreover, the cases and Attorney General opinions cited by Petitioners refer not to the statute in issue here, but to Kentucky's open records law enacted at KRS 61.878.

Whether or not the statute in issue here violates the First Amendment rights of the Respondents is not affected by interpretations of a completely different statute.

Petitioners argue that Kentucky's open records laws will also prevent Respondents from accessing these reports and conclude that this fact either renders the Sixth Circuit's decision "moot" or, alternatively, requires Kentucky agencies to act contrary to Kentucky law. These arguments set logic on its head without presenting an issue worthy of review. If, for instance, Petitioners can lawfully deny Respondents access to these reports without the aid of an unconstitutional law, then one wonders why they seek so assiduously to argue for its constitutionality.

Moreover, the invalidation of this statute does not by implication invalidate any other statute. Accordingly, the absence of this statute will not compel the violation of the open records laws. Finally, if the privacy interest of Kentucky citizens is, in fact, foremost in the thoughts of the Petitioners, it is also unclear why they do not urge amendment of the statute to excise that portion of it which renders it unconstitutional, i.e., the provision that allows the press access to the reports but prohibits the press from using the information contained in them for a "commercial purpose."

Finally, contrary to Petitioners' argument, neither the Driver's Protection Act nor Kentucky's adoption of

regulations pursuant to that Act are implicated by the Sixth Circuit's decision. First, the constitutionality of the Federal Act was not challenged by Respondents in this case. Accordingly, the issue before this Court on a petition for certiorari granted in *Condon v. Reno, supra,* is not present in this case.

Moreover, neither the provisions of the Act nor the regulations adopted by the Kentucky Department of Vehicle Regulations to implement the Act conflict with the Sixth Circuit's decision in this case. First, the Federal Act does not prohibit disclosure of the accident reports in issue here inasmuch as the Act allows as a "permissible use" of motor vehicle records the disclosure of "personal information" "for bulk distribution for surveys, marketing, or solicitations. . . . " 18 U.S.C. § 2721(b)(12). The Kentucky regulations implementing the Act also allow "the selling of information from the Automated Vehicle Information System relating to a motor vehicle registered or titled in the Commonwealth of Kentucky . . . if the information is to be used, rented, or sold solely for bulk distribution for surveys, marketing, or solicitations." 601 KAR 2:020E § 5(1). Moreover, Kentucky's regulation implementing the Federal Act expressly provides that "a motor vehicle accident report" "shall not be considered private information." 601 KAR 2:020E § 2(1)(a).

Kentucky law allows expressly for both the disclosure and the sale of the motor vehicle accident reports in issue here. Accordingly, there is no conflict between the Sixth Circuit's opinion in this case and Kentucky or federal law on the disclosure or sale of motor vehicle accident reports.

III. The issues decided in *Los Angeles Police Department v. United Reporting Publishing Corp.* are sufficiently dissimilar to those in the instant case that this Court's grant of certiorari in that case should not affect its consideration of the Petition in this case.

Petitioners argue that the grant of the petition for a writ of certiorari in *Los Angeles Police Department v. United Reporting Publishing Corp.*, 146 F.3d 1133 (9th Cir. 1998), *cert. granted*, 119 S.Ct. 901, 142 L.Ed.2d 901, ___ U.S. ___ (January 25, 1999), is both similar to this case in that it involves an open records issue, but also dissimilar in that it does not address "a constitutional right to access government records" or "a distinction of access . . . for access by parties involved in the accident and news media; . . . " Petition at 37. Where allegedly similar, Petitioners appear to argue that the Ninth Circuit's decision represents a split in the circuit courts of appeal; where dissimilar, Petitioners appear to argue that the grant of certiorari will not resolve issues in this case. Neither assertion is valid.

First, the statute in *United Reporting* and the state legislative background against which the statute was evaluated are so dissimilar to this case that the "open records" issue resolved there would not resolve the issues here. In *United Reporting Publishing* the statute in issue allowed access to criminal records but prohibited the information obtained from being used to sell services. *United Reporting Publishing*, 146 F.3d at 1135. In this case, the records in issue are motor vehicle accident reports to which Respondent attorneys and chiropractors are denied

access and Respondent publisher is allowed access but prohibited from using for a "commercial purpose."

The legislative background that differentiates these circumstances is the Federal Driver's Protection Act and Kentucky's regulations implementing them. As discussed in section II above, the Driver's Protection Act would allow access to these records and their use for the very purposes intended by the Respondents, as would the Kentucky regulations implementing that Act.

Although the underlying rationale for invalidating the California statute was similar to the rationale employed by the Sixth Circuit in this case, since the Federal Act and Kentucky regulations, as well as pre-existing Kentucky Attorney General opinions, would all allow access to the records in issue here against any argument of privacy rights, resolution of the issues raised in *United Reporting Publishing* would not compel a different result in this case.

Moreover, as discussed in section I above, neither this case nor *United Reporting Publishing* addressed the issue of whether there "is a constitutional right to access government records." Both cases involve prohibitions on the use of government records for commercial speech purposes – a distinction Petitioners persist in disregarding. Since neither case involves a pure access issue, the grant of certiorari in either case would not resolve the issue and it does not constitute a compelling reason for granting the Petition in this case.

IV. Since the Sixth Circuit vacated the District Court's judgment on the unreasonable fee issue and remanded that claim to the District Court for findings of fact and conclusions of law in order to enable the Sixth Circuit to judge the validity of Respondents' arguments, it would be inappropriate for this Court at this point to exercise its discretionary jurisdiction to review the claim.

This Court's certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision . . . and except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). In fact, the lack of finality in the judgment below may "of itself alone" furnish "sufficient ground for the denial of the application." *Id.*

For that reason, in *Virginia Military Institute v. United States*, 508 U.S. 946 (1993), this Court denied the petition for writ of certiorari to the Fourth Circuit Court of Appeals on its order vacating the judgment of the District Court and remanding to that court for the determination of an appropriate remedy. The Fourth Circuit had "expressly declined to rule on the 'specific remedial course that the Commonwealth should or must follow hereafter, and suggested permissible remedies other than compelling the Virginia Military Institute to abandon its current admissions policy." *Id.* The reason for denying the petition was the Court's observation that it "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Id.* The Court believed "it prudent to take that course here," noting that denial of

the petition at that juncture would "not, of course, preclude VMI from raising the same issues in a later petition, after final judgment has been rendered." *Id.* Indeed, the subsequent petition for certiorari was, in fact, granted after the remand to the District Court and subsequent final decision of the Fourth Circuit.

In *Brotherhood of Locomotive and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967), this Court relied on the same rationale in denying the petition for a writ of certiorari to the District of Columbia Circuit Court, which had remanded to the district court "to consider whether there had in fact been a contempt [of the district court's order forbidding a strike], and, also, if there was a contempt, whether it was 'of such magnitude as to warrant retention, in part or to any extent, of the coercive fine originally provided for in contemplation of an outright refusal to obey.' " *Id.* at 328. There the petition was denied because the Court of Appeals' remand of the case rendered it "not yet ripe for review by this Court." *Id.*

The same is true here with respect to the unreasonable fee issue. As the Sixth Circuit observed, Respondents had "contend[ed] that the agency responsible for implementing [KRS] 61.874 [had] applied the 'reasonable fee' provision" of the statute "in an arbitrary and discriminatory manner insofar as commercial users are concerned." *Amelkin*, 168 F.3d at 901. The district court had enjoined enforcement of the statute without making specific findings regarding the factors to be considered in deciding whether to grant a preliminary injunction. The Sixth Circuit believed that "without the benefit of such factual findings, it is impossible for us to judge the validity of the Plaintiffs' arguments." *Id.* at 902.

The Sixth Circuit vacated and remanded the case "back to the district court to make findings of fact and conclusions of law with regard to how § 61.874 has been applied by the state agency" and suggested the particular area in which the court believed such findings would need to be made in order for it to review whatever judgment the district court would ultimately issue. *Id.* The Sixth Circuit did not utter any judgment regarding the validity or invalidity of the Respondent's arguments, finding that it could not do so until findings were made on whether the Petitioners were using the "creation" language in § 61.874(4)(c)(2) "to charge commercial users not only for the compilation, storage, and upkeep of such records by the agency itself, but also for the state's investigative and personnel costs that went into 'creating' the record," noting that "the agency might be using this language to recoup the state's costs for law enforcement's investigation that backs up to the interpretation of accident reports." *Id.* The Sixth Circuit observed, but did not decide, that "any such interpretation of the statute **might** well be an arbitrary and capricious application sufficient to demonstrate that it is unconstitutional as applied." *Id.* (emphasis added).

Accordingly, the Sixth Circuit did not render a final decision on the Respondent's claim that the fees charged by Petitioners for copies of accident reports constitute an arbitrary and discriminatory tax on Respondents' exercise of commercial speech rights. As a result, this issue is not in a posture that it would be reasonable for this Court to exercise its discretion to review. There has not been a final determination that Petitioners' conduct with respect

to whether the imposition of these fees violates the constitutional rights of the Respondents. In the absence of such a determination, there is no reviewable judgment and the Petition on this issue should be denied.

CONCLUSION

The petition for writ of certiorari to the Sixth Circuit for the Court of Appeals should be denied.

Respectfully submitted,

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APPENDIX

1988-1991 Ky. Op. Atty. Gen. 2-251, Ky. OAG 89-76, 1989 WL 434328 (Ky.A.G.)

Office of the Attorney General
Commonwealth of Kentucky

OAG 89-76
October 19, 1989

Open Records Appeal
File Identification No. 89-882
Jeffrey D. Thompson

Mr. Walter L. Cato, Jr.
510 Starks Building
Louisville, KY 40202

Dear Mr. Cato:

Mr. Jeffrey D. Thompson has appealed to the Attorney General pursuant to KRS 61.880 your denial of his request to inspect all automobile accident reports prepared by the Shively Police Department during the four week period prior to the date of inspection.

Mr. Thompson requested the opportunity to inspect said documents by letter dated May 24, 1989. In this letter, Mr. Thompson indicated that he anticipated making future requests on a weekly basis. You denied this request by letter dated June 1, 1989. As reasons for this denial, you attached your response to an identical request. That response, dated March 14, 1989, relied upon the exemption of KRS 61.878(1)(a). This response also based the denial of inspection on KRS 61.872(2) which provides that the official custodian may require written application describing the records to be inspected. Finally, this response based the denial on KRS 61.872(5)

which pertains to requests which place an unreasonable burden on the public agency.

Mr. Thompson requested the Attorney General to review this denial by letter dated June 2, 1989. Mr. Thompson referred this office to OAG 83-53 in support of his claim that the records requested are subject to inspection.

OPINION OF THE ATTORNEY GENERAL

This office has repeatedly and consistently held that uniform police traffic accident reports prepared by law enforcement officers pursuant to KRS 189.635 are not confidential and are open records under the open records law. OAG's 83-53, 80-210, 76-478. [Copies enclosed.] This office reaffirms its prior opinions on this subject and holds that the records sought for inspection by Mr. Thompson are not exempt under the provisions cited in your letter of denial and must be made available.

KRS 61.878(1)(a) provides in part as follows:

> The following public records are excluded from the application of KRS 61.870 to 61.884. . . . (a) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.

Your letter relied in part upon KRS 61.878(1)(a) in denying Mr. Thompson's request. Specifically, your letter states that some of the information included on accident reports, such as driver's license numbers which are identical with social security numbers, and names and addresses of parties and witnesses would constitute an

invasion of personal privacy if disclosed. It is true that social security numbers are exempt from public inspection under the provisions of KRS 61.878(1)(a). OAG 84-51. This office does not agree, however, that the names of parties and witnesses are excluded from public inspection. OAG 82-234. However, the fact that some information contained in police accident reports may be exempted from public inspection does not relieve the public agency of providing the other information which is not exempted from public inspection. KRS 61.878(4) provides as follows:

> If any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the non-excepted material available for examination.

Therefore, a public agency may blot out or expunge information which is excluded from public inspection and make the non-excepted material available for inspection. The task of separating excepted material from non-excepted material on voluminous numbers of police accident reports is admittedly burdensome. However, the decision to do so rests within the sound discretion of the public agency because the exemptions contained within KRS 61.878(1) are permissive, not mandatory. OAG's 84-163, 83-329, 82-275, 80-519, 79-275. Therefore, the Shively Police Department may make available all information contained on uniform police traffic accident reports or may expunge that information which is exempt from inspection, but may not deny inspection of the entire report.

Your letter of denial was also based in part upon KRS 61.872(2) which provides as follows:

> Any person shall have the right to inspect public records during the regular office hours of the public agency. The official custodian may require written application describing the records to be inspected.

Your denial letter appears to maintain that the written letter by Mr. Thompson, although sufficient for purposes of satisfying the requirement of a "written application," does not sufficiently describe the records to be inspected. This office disagrees. Mr. Thompson's letter expressly requests that he be permitted to inspect "all accident reports prepared for a period of four (4) weeks prior to the date of inspection." The letter attached to your letter of denial indicates that approximately 50 accident reports per week are prepared. Therefore, Mr. Thompson is requesting to inspect approximately 200 accident reports and has identified without any ambiguity which accident reports he wishes to inspect. The public agency may designate the place, time, and date on which the public records will be available for inspection and therefore there should be no doubt about which records Mr. Thompson wishes to inspect. KRS 61.872(4).

The third reason given for denial of Mr. Thompson's request is based upon KRS 61.872(5) which provides as follows:

> If the application places an unreasonable burden in producing voluminous public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential

> functions of the public agency, the official custodian may refuse to permit inspection of the public records. However, refusal under this section must be sustained by clear and convincing evidence.

[Emphasis added.]

This office does not believe that you have provided clear and convincing evidence that Mr. Thompson's request places an unreasonable burden on the Shively Police Department or that Mr. Thompson's request is intended to disrupt essential functions of the department. The Shively Police Department is not required to review voluminous numbers of reports and make selected copies of them for Mr. Thompson. Mr. Thompson may be shown where the reports are filed and review the reports himself. This procedure should not prove to be unreasonably burdensome.

The March 14, 1989, letter attached to your letter of denial indicates that the Shively Police Department has the following policy:

> To provide copies of individual police reports to attorneys who advise that they represent one of the parties involved or a witness to the accident and who can identify the report by name of party and date or approximate date. Report copies are also to be provided to individuals who are involved in an accident or witnesses thereto.

This policy reflects a practice of providing public records to certain persons and denying the same records to other persons. This policy is in violation of the open records law. The exemptions of KRS 61.878(1) may be

invoked according to the nature of the record, but not according to the person who is requesting the inspection or the stated or suspected purpose of the inspection. OAG 82-233. In the future, the Shively Police Department should refrain from permitting inspection of public records by some individuals and denying inspection of the same public records to other individuals.

It is the opinion of the Attorney General that the records sought for inspection by Mr. Thompson are not exempt under the provisions cited in your letter of denial and must be made available. The Shively Police Department may exercise its prerogative to delete exempted material contained in the police accident reports, provided there is consistent application of this prerogative without regard to the individual requesting inspection. The Shively Police Department may institute proceedings within 30 days injunctive or declaratory relief in the circuit court of the district where the public records are maintained pursuant to KRS 61.880(5).

Sincerely,

Frederic J. Cowan
Attorney General

William B. Pettus
Assistant Attorney General